

UNITED STATES DISTRICT COURT
DISTRICT OF MICHIGAN

JIMMIE DAVIS,
Petitioner

VS

JOHN B. GARCIA, et al,
Respondents

CV-N-99-137-ECR (PHA)

Supplemental Points
and authorities

FILED
U.S. DISTRICT COURT
DISTRICT OF MICHIGAN
AUG 20 1999
12:48 PM

Pursuant to the court's order dated Aug. 2, 1999
WHICH STATES THAT Petitioner will HAVE 20 DAYS
to file supplemental points and authorities addressing
whether he can overcome the procedural bar
that is applicable to Ground Two (b-d). Petitioner
now submits supplemental points and authorities.

Petitioner previously filed a motion concerning
the dismissal of Ground 2 (b-d) but after he
let a law clerk read it petitioner was told that
the order was to dismiss ~~the~~ all two grounds.
(Ground two and three.) Petitioner does not
concede to the dismissal of his whole petition
if this is so. Petitioner now submits a valiant
effort to prove cause and prejudice attributable
thereto based on the valid points of the record.
CAUSE FOR DEFAULTED
CLAIM

The order states in Part that petitioner
must show that failure to consider his defaulted
claims will result in a fundamental miscarriage of

1 Justice MARRIS v. Reed, 489 U.S. 255, 262 (1989) or cause
 2 for the default and Prejudice attributable there
 3 to. Specifically in order to overcome being
 4 procedurally barred from federal habeas review
 5 petitioner must explain why he failed to raise
 6 ground TWO b-d in his first post conviction petition
 7 for writ of habeas corpus.

8 IT was THROUGH NO FAULT of petitioners that the
 9 issues were not raised. petitioner now submits
 10 exhibit A pg. 27. the supplement of petitioner
 11 original petition dated March 6, 1991 which states
 12 That appellant did try to raise the issues of ground
 13 2 d so petitioner will ~~also~~ ask the court to
 14 dismiss ground 2 b-c but not ground 2 d. The
 15 ~~respondent~~ respondent will argue that petitioner
 16 made this up so appellant has attached (1) The
 17 Supplemental brief exhibit B page 28 through
 18 32 (2) the papers he received when he tried to

19 ~~FILE ANYTHING SO HE FORWARDED HIS SUPPLEMENT TO~~
 20 ~~HIS ATTORNEY OF RECORD PAGE 17 (3) AFTER~~
 21 FILE ANYTHING SO HE FORWARDED HIS SUPPLEMENT TO
 22 his attorney of record page 17 (3) after
 23 numerous attempts to get attorney to file
 24 supplement petition wrote the bar and bring
 25 this to their attention Grievance file #
 26 91-101-11 pages 13 to 16 (letter stating
 27 she would not file supplement. Soon after
 28 petitioner was appointed new counsel

1 who also received the supplemental brief but did
 2 ~~not file it~~
 3 not file it. Letter FROM New attorney page —
 4 34 stating that he received the supplemental
 5 brief dated March 6 1991. He instead supple
 6 mented his own and just used petitioner's
 7 affidavit page 37 to 40 "supplemental
 8 affidavit filed and stamped Jan 9, 1992 still
 9 before petitions original petition was heard"
 10 which states in ~~Number 13~~ THAT The
 11 court did not have jurisdiction to accept
 12 guilty plea based on robbery allegations page
 13 42 to 43. It is clear that petitioner state his
 14 claims in his Supplemental affidavit which was
 15 filed in support of his original petition. And
 16 along with all true and correct letters from the
 17 bar, both attorneys, and his letters petitioner
 18 tried hard to present his claim. An external
 19 factor impeded efforts to comply with the state
 20 procedural rules Murray v. U.S. 477 U.S. at 488.
 21 and interference by state officials Buffalo v. SUNN,
 22 854 F.2d 1158, 1163 (9th Cir 1988)

23 prejudice

24 as stated in petitioner's affidavit Number 14
 25 page 39 Filed and stamped to original
 26 supplement The court dismissed the robbery
 27 information and agreed that it was a jurisdictional
 28 error, Furthermore the information used to

1 establish the degree of the crime violated the
 2 due process clause. This worked to the actual
 3 and substantial disadvantage in facting his entire
 4 trial with error of constitutional dimensions
 5 UNITED STATES V FRADY 456 U.S. 152, 170 (1982)
 6 They should have held the charges "all" in
 7 abeyance until the jurisdiction was resolved
 8 and not wondered for two months if Petitioner
 9 was really 16 even now saying why didn't petitioner
 10 tell them but no one wanting to take responsibility
 11 why he had been in an adult JAIL for months
 12 without anyone knowing. ~~that~~ Petitioner
 13 had never been committed to any juvenile facility
 14 so there was a chance even if slim that the juvenile
 15 courts would have retained jurisdiction because
 16 they could in accordance with the law at the
 17 time petitioner ~~was sent to the adult~~
 18 entered his plea see Exhibit C page 43
 19 where the prosecutor states: after he
 20 was held to answer I've had discussions with
 21 his counsel and conducted some investigation
 22 and I believe him to be 16. AND AS I
 23 understand the law now although a person
 24 of any age can originally be charged in
 25 the adult courts with murder, for any other
 26 crime even if it was committed during the
 27 murderous transaction he has to be
 28 charged originally in juvenile court. THE

1 court: he has to be certified. Exhibit C
 2 page 43.

3 These errors so infected petitioners
 4 plea that the resulting conviction violated
 5 due process because after it was dismissed
 6 and the court said it was Jurisdictional ~~the~~
 7 Exhibit C page 43. The robbery was
 8 ~~used~~ To try and establish murder 1 "first
 9 degree The state prosecutor said that it
 10 ~~was~~ dismissal of Count II in no way has
 11 anything to do with the negotiations and is
 12 not consideration Exhibit C page 43
 13 but it was Exhibit D page 44

14 stating ~~that~~ by petitioners attorney AND the
 15 other under standing is, Your Honor that the
 16 state will not go down and try to certify
 17 our client on the robbery and bring him
 18 back, Exhibit D page 44.

19 These errors of constitutional dimensions
 20 United States v. FRADY 456 U.S. 152, 170 (1982)
 21 have violated petitioners due process rights.

22 ~~THE DISMISSAL OF THE INSTANT CLAIM WOULD RESULT IN~~
 23 ~~A FUNDAMENTAL MISFEASANCE OF JUSTICE~~

24 THE DISMISSAL OF THE INSTANT CLAIM WOULD RESULT IN
 25 A FUNDAMENTAL MISFEASANCE OF JUSTICE petitioner
 26 was convicted of 1 degree Murder. The police
 27 testified that he was told the shooting was
 28 accidental on record, the eye witness testified

1 THAT THE shooting was an accidental one
 2 on record. Petitioner stated on record that
 3 that ~~at that time~~ as he went to put the gun down
 4 — as I closed the trigger the gun
 5 shot. Exhibit E page 47.
 6 Petitioner has stated this from the onset
 7 that the elements of the crime were not ~~the~~
 8 told to him and since the court never obtained
 9 proper jurisdiction once petitioner was held to
 10 answer in adult court in accordance with
 11 the law ~~at~~ the time petitioner was sentenced
 12 the conviction is a nullity because jurisdiction
 13 did attach once the robbery was charged, citing
 14 U.S. v. FRADY 102 S Ct at 1546. AT the outset,
 15 we emphasize that this would be a different
 16 case had FRADY brought before the District
 17 court affirmative evidence indicating that he
 18 had been convicted wrongly of a crime of which
 19 he was innocent. ~~But~~ FRADY IT MUST BE
 20 remembered, did not assert at TRIAL that
 21 he and Richard Gordon beat THOMAS Bennett
 22 to death without malice. INSTEAD, FRADY
 23 CLAIMED he had nothing to do with the crime.
 24 — Since that time FRADY has never
 25 presented colorable evidence even his own
 26 testimony, indicating such justification,
 27 mitigation or excuse that would
 28

1 Reduce his crime FROM MURDER TO
 2 MANSLAUGHTER. - IN THE CASE
 3 Now before the court DAVIS (petitioner)
 4 has shown over welming on record
 5 evidence which proves he is not guilty
 6 of the 1 degree murder charge. he stands
 7 convicted of, ~~the~~ Citing WAINWRIGHT,
 8 SYKES 97 S.C. 2497 (1977) at 2502 "AN
 9 imprisonment under a judgment cannot be
 10 unlawful, unless that judgment be an
 11 absolute nullity; and it is not a nullity if
 12 the court has general jurisdiction of the
 13 subject, although it should be erroneous.
 14 MENDERSON V KIBBE 431 U.S. at 154 97 S.C.
 15 at 1736 THE COURT HAS HELD THAT THE
 16 DUE PROCESS CLAUSE PROTECTS THE
 17 ACCUSED AGAINST CONVICTION except
 18 UPON PROOF beyond a reasonable doubt
 19 OF EVERY FACT NECESSARY TO CONSTITUTE
 20 THE CRIME WITH WHICH HE IS CHARGED.
 21 IN RE WINSHIP, SUPRA, 397 U.S. at 364,
 22 905 Ct at 1073.
 23
 24
 25
 26
 27
 28

CONCLUSION

For the reasons set forth above, petitioner's Petitioner's Petition should not be dismissed but the court should ~~just~~ dismiss Ground 2 and allow respondent to respond to the claims presented in petitioner's writ of Habeas corpus.

JIMMIE DAVIS
27362

P.O. Box 607
CARSON CITY
NEVADA
89702

CERTIFICATE
OF
MAILING

JIMMIE DAVIS SAYS:

ON THE 18 DAY OF AUGUST
1999

I DEPOSITED IN THE NEVADA
STATS PRISON MAIL ONE ORIGINAL
and copy to the Below list of
Addresses: Supplemental Points
and authorities

CLERK U.S. DISTRICT COURT
DISTRICT OF NEVADA
400 SOUTH VIRGINIA ST. ROOM 301
RENO NEVADA 89501

1030

STATE OF NEVADA
OFFICE OF ATTORNEY GENERAL
555 E. WASHINGTON AVENUE, SUITE 3900
LAS VEGAS NEVADA 89101

DATED this 18 DAY OF AUGUST 1999

Jimmie DAVIS 27362
Jimmie DAVIS 27362
P.O. BOX 607
CARSON CITY NEVADA
89702

9

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400 SOUTH VIRGINIA ST. ROOM 301
RENO NEVADA 89501

1030

STATE OF NEVADA
OFFICE OF ATTORNEY GENERAL
555 E. WASHINGTON AVENUE, SUITE 3900
LAS VEGAS NEVADA 89101

DATED this 18 DAY OF AUGUST 1999

Jimmie DAVIS 22362
JIMMIE DAVIS 22362
P.O. Box 607

CARSON CITY NEVADA
89701

Lee Elizabeth McMahon

Attorney at Law
Granada Business Complex, Suite 9
216 South Seventh
Las Vegas, Nevada 89101

(702) 382-2741

January 22, 1990

File No. _____

Mr. Jimmie Davis
Southern Nevada Correctional Center
P.O. Box 208
Indian Springs, Nevada 89018

Re: Petition for Post-Conviction Relief
Case No. C85078

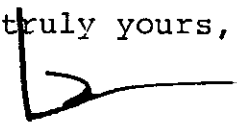
Dear Mr. Davis:

The Honorable Earle W. White, Jr. has appointed me as counsel for your Petition for Post-Conviction Relief.

I have a copy of your proper person petition and have requested a transcript of your plea entry, which I expect to receive within two weeks.

Judge White has set February 5, 1990 as a status check date. If I have the transcript by that date he will set a briefing schedule and that time.

Very truly yours,


LEE ELIZABETH McMAHON, ESQ.

LEM:pb

Copy

Anthony C. Green
Inmate Law Clerk
P.O. Box 208, SDCC
Indian Springs, NV 89070

January 24, 1991

Lee Elizabeth McMahon, Esq.
Granda Business Complex, Ste. 9
216 South Seventh Street
Las Vegas, Nevada 89101

Re: State v. Davis,
Case No. C85078, Dept. IV

Dear Ms. McMahon:

I have been instructed to inform you that your client, Jimmie Davis, has been transferred from the Southern Desert Correctional Center, located at Indian Springs, to Ely State Prison, P.O. Box 1989, Ely, Nevada 89301 because of his sentence structure, i.e., life without possibility of parole.

Because I prepared Jimmie's Post-Conviction Petition, and have been monitoring the case since its filing, I cannot help but notice that had you prosecuted this Petition in a timely manner and been successful, Jimmie would still be here at Indian Springs; and not in the hardened, and possibly life-threatening, environment of the Ely State Prison.

In any event, I have also been instructed to ask that you take whatever action is necessary to have this matter submitted to the Court forthwith for its consideration. Should you fail to do this in what we might determine to be prompt, Jimmie's parents have been instructed to notify the judge of Department IV, the Nevada Supreme Court and the State Bar and inform them of the facts of the case and your lack of diligence in pursuing its prosecution and your failure to keep Jimmie properly informed, as mandated by SCR 152, 153 and 154, and seek their intervention.

Please direct any response to either myself or Jimmie directly at the addresses set forth above.

Sincerely

Anthony C. Green
Anthony C. Green,
Inmate Law Clerk

Jimmie Davis
P. O. Box 1989
Ely, NV 89301

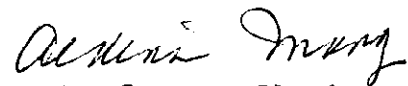
Re: Case No. C85078 - State vs. Jimmie Davis

Rule 3.70. Papers which may not be filed.

Except as may be required by the provisions of NRS 34.730 to 34.830, inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed, but must be forwarded to that attorney for such consideration as counsel deems appropriate. This rule does not apply to applications made pursuant to EDCR 7.40(b)(2)(ii).

REASON FOR NEW RULE - To permit the clerk to forward to counsel all papers received from a defendant represented by an attorney.

Your Motion for Briefing Schedule and Evidentiary Hearing date for Petitioner for Post Conviction Relief has been forwarded to your attorney, Lee McMahon, Esq.


Deputy County Clerk
4/23/91

REPLY TO ☐ RENO ☒ LAS VEGAS

August 12, 1991

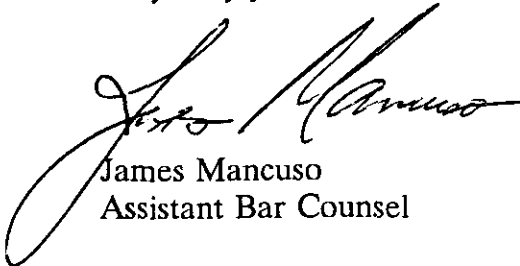
Mr. Jimmie Davis #27362
P.O. Box 1989
Ely, NV 89031

Re: Grievance File #91-101-11

Dear Mr. Davis:

Enclosed please find a copy of Lee Elizabeth McMahon, Esq.'s response to your letter of complaint. If you have any additional comments or clarifications please send them to this office in writing within the next ten (10) days. This matter will be presented to the next meeting of the screening panel of the Southern Nevada Disciplinary Board. You will be notified once the panel has reviewed the file and reached a disposition.

Very truly yours,



James Mancuso
Assistant Bar Counsel

JM:jn

Enclosure

13

To State Bar of Nevada
500 S. 3rd Street
Las Vegas NV 89101

Dear State Bar of Nevada

I am writing you due to a serious matter that has developed since my counsel, Lee Elizabeth Mc Mahon, Nevada Bar #001765 was appointed to my case to represent me in my pending petition for Post-Conviction Relief.

I request to bother you about this situation which has occurred, I have forwarded three letters to Mrs Mc Mahon asking her to please inform me as to what she is preparing on my case. Copies of letters submitted here with. All of my letters have gone unanswered. Also I forwarded to her a supplemental petition requesting that she submit it before the court, no answer was sent to me whether she has filed it or not. I have not heard from her in over a year while my Post Conviction is still pending in District Court IV.

I know this is not your problem, but I certainly need some guidance asking you please to contact ~~for~~ Mrs Mc Mahon asking her to contact me in this matter so I will not have to further Persevere a Writ of Mandamus.

14

Because she refuses to accept my phone calls and reply to my letters this has become a serious matter and upon my transfer to Ely State Prison and further research on Mrs McMahon I have found she has a past history of having complaints filed against her for not pursuing other post conviction relief actions.

I have written the Judge in the Eighth Judicial Court Dept IV presiding over my case in this matter, copy of letter submitted her with. May she would respond to the Nevada State Bar if you could take the time to find out why she does not respond to my inquiries of a status check on my case I would very much appreciate your assistance in this matter so I will not have to pursue any further legal action against her.

Respectfully Submitted
 Jimmie Davis ²⁷³⁶²
 Ely State Prison
 P.O. Box 1989
 Ely, Nev 89301

⁷
Certificate of Service By Mail
I Jimmie Davis do hereby solemnly
swear, under the penalty of perjury, that
I have served a true and correct copy of the
foregoing letter to the State Bar of Nevada
and my Attorney of Record Lee Elizabeth
McMahon, Nevada Bar #001765 by placing
it in the same in an envelope postage
prepaid and placing it in the United
States Mails from Ely State Prison
on this day of 5-11-91 1991 addressed to

State Bar of Nevada
500 S 3rd Street
Las Vegas NV 89101

and

Lee Elizabeth McMahon Esq
Nevada Bar #001765
216 South Seventh St. Suite 8
Las Vegas, Nev 89101

Respectfully submitted
Jimmie Davis
Ely State Prison
P.O. Box 1988
Ely Nev 89301

per N.R. 5208.165

March 6, 1991

To: Lee Elizabeth Mc Mahon,
Attorney at Law
216 South Seventh Street, Suite 9
Las Vegas, Nevada 89101

Dear Counsel:

I have enclosed a copy of the
supplemental petition for post-conviction relief and the points
and authorities in support of the petition that I wish to have
you file. Also, I request that you reschedule this case for a
hearing after you file my supplemental petition. It has been
almost thirteen months since I heard anything from you or the
Court. After you file my supplemental petition please send me a
filed stamped copy.

Sincerely,

Jimmie Davis #27362

Jimmie Davis,
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301

1 To the Honorable Judge Bongiovanni Dept IV
 2 Eighth Judicial District Court
 3 200 S. Third Street
 4 Las Vegas, Nevada 89155

5 RE: Appointed Counsel, Lee Elizabeth McMahon

6
 7 Dear Judge

8 I am writing you due to a serious matter
 9 that has developed since my counsel, Lee
 10 Elizabeth McMahon was appointed to my case
 11 to represent me in my pending petition for
 12 Post-conviction relief.

13 Your Honor, I request to bother you about
 14 this situation, which occurred upon me once
 15 before that is my last counsel and now my
 16 present counsel's failure to keep me advised of
 17 my legal proceedings.

18 I have forwarded three letters to Mrs McMahon
 19 asking her to please inform me as to what she
 20 is preparing on my behalf. All of my letters
 21 have gone unanswered, also, I forwarded to
 22 her a Supplemental Petition requesting that
 23 she submit it before your Court. Evidently, she
 24 has not.

25 Your Honor, I know this is not your problem
 26 but I certainly need some guidance on what to
 27 do on this very serious matter. Because she
 28 refuses to accept my phone calls and reply to
 my letters maybe she would listen to you
 If you could take the time to find out why
 she does not respond to my inquiries of a
 status check on my case. I would very
 much appreciate your assistance in this matter

18 thank you

1 Case No. C85078

2 Dept. No. IV

3
4
5
6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
7 STATE OF NEVADA IN AND FOR CLARK COUNTY

8 Jimmie Davis,

9 Petitioner,

10 v.

11 THE STATE OF NEVADA,

12 Respondent.

PETITION FOR
POST-CONVICTION RELIEF
(NRS 177.315 et seq.)

13
14 INSTRUCTIONS:

15 (1) This petition must be legibly handwritten or typewritten,
signed by the petitioner and verified.

16 (2) Additional pages are not permitted except where noted or
with respect to the facts which you rely upon to support your
grounds for relief. No citation of authorities need be furnished.
17 If briefs or arguments are submitted, they should be submitted in
the form of a separate memorandum.

18 (3) If you want an attorney appointed, you must complete the
Affidavit in Support of Request to Proceed in Forma Pauperis. You
19 must have an authorized officer at the prison complete the certifi-
cate as to the amount of money and securities on deposit to your
20 account in the institution.

21 (4) You must include all grounds or claims for relief which
you may have regarding your conviction or sentence. Failure to
raise all grounds in this petition may preclude you from filing
22 future petitions challenging your conviction and sentence.

23 (5) You must allege specific facts supporting the claims in
the petition you file seeking relief from any conviction or sen-
tence. Failure to allege specific facts rather than just conclus-
24 ions may cause your petition to be dismissed.

25 (6) When the petition is fully completed, the original and
one copy must be filed with the clerk of the state district court
for the county in which you were convicted within 1 year after the
26 final judgment of conviction, or within 1 year after the final
decision in your appeal if you appealed your conviction. One copy
27 must be mailed to the clerk of the county in which you
were convicted or to the attorney. Copies must conform
28 in all particulars to the rules for filing.

(7) Failure to follow these instructions may result in dismissal of your petition. Failure to state clearly and precisely the grounds upon which you make your claim for relief, and to state clearly and precisely the facts and circumstances which give rise to your claim, may result in dismissal of your petition.

PETITION

1. Did you personally prepare your petition? If not, who did? Give name and, if a prisoner, his prison number: _____

William McKinney, Inmate #13355, ELY State Prison

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court

In the County of Clark, Las Vegas, Nevada

3. Date of judgment of conviction: December 12, 1988

4. Length of sentence: Life Without Parole

5. Nature of offense involved (all counts) First

Degree Murder

6. What was your plea? (check one):

(a) Not guilty _____ (b) Guilty X (c) Nolo contendere _____

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, or if the guilty plea was negotiated, give details:

the negotiations was that the petitioner plead guilty to first degree murder without the use of a deadly weapon as a lesser included offense of count one and stipulate that the punishment be life without parole.

7. Kind of trial (check one):

(a) Jury _____ (b) Judge without a jury X

8. Did you testify at the trial? Yes _____ No X

9. Did you appeal from the judgment of conviction?

Yes _____ No X

.....

10. If you did appeal, answer the following:

(a) Name of court: N/A

(b) Result: N/A

(c) Date of result: N/A

11. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes X No

12. If you answer to No. 11 was "yes," give the following information:

(a) (1) Name of court: Eighth Judicial District Court, Clark County, Nevada.

(2) Nature of proceeding:

Post-Conviction Relief

(3) Grounds raised: Plea was not knowingly and understandingly; Sentence was cruel and unusual punishment; Sentence violated the equal protection clause; Plea was entered without the effective assistance of counsel.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes No X

(5) Result: The case is still pending.

(6) Date of result: N/A

(7) If known, citations of any written opinion or orders entered pursuant to such result: N/A

(b) As to any second petition, application or motion give the same information:

(1) Name of court: N/A

1 (2) Nature of proceeding: N/A

4 (3) Grounds raised: N/A

7 (4) Did you receive an evidentiary hearing on your petition,
8 application or motion? Yes No N/A

9 (5) Result: N/A

10 (6) Date of result: N/A

11 (d) Did you appeal to the highest state court having juris-
12 diction, the result of action taken on any petition, application
13 or motion?

14 (1) First petition, application or motion? Yes No N/A

15 (2) Second petition, application or motion? Yes No

16 (3) Third petition, application or motion? Yes No

17 (e) If you did not appeal from the adverse action on any
18 petition, application or motion, explain why you did not. (You
19 must relate specific facts in response to this question. Your re-
20 sponse may be included on paper which is 8 1/2 x 11 inches attached
to the petition. Your response may not exceed five handwritten
or typewritten pages in length.)

21 N/A

23 13. Has any ground being raised in this petition been pre-
24 viously presented to this or any other court by way of petition
25 for habeas corpus, motion or application? If so, identify:

26 (a) Which of the grounds is the same: None of the grounds
27 raised herein were raised in the original petition for post-
28 conviction relief.

LAW LIBRARY

(b) The proceedings in which these grounds were raised:

N/A

14. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: COURT FAILED TO EXPLAIN THE ELEMENTS OF THE OFFENSE TO THE PETITIONER

Supporting FACTS (Tell your story briefly without citing cases or law.): The record is bare of the elements of first degree murder. See Guilty plea transcript attached hereto.

(b) Ground two: The petitioner was denied due process of law by use of robbery allegations to establish felony murder

Supporting FACTS (Tell your story briefly without citing cases or law.): At guilty plea transcript page 3 the prosecutor dismissed the robbery and told the Court that it was not considered. At (Guilty Plea trans. P. 7 and 8) he used robbery to establish murder in the first degree.

(c) Ground three: Court did not have jurisdiction to accept guilty based on robbery allegations.

Supporting FACTS (Tell your story briefly without citing cases or law.): At (guilty plea trans P.3) the Court dismissed the robbery information and agreed that it was jurisdictional error, but the State was allowed to use robbery allegation to establish first degree murder.

(d) Ground four: THE INFORMATION USED TO ESTABLISH THE DEGREE OF THE CRIME VIOLATED THE DUE PROCESS

CLAUSE
Supporting FACTS (Tell your story briefly without citing cases or law.): (See Points and authorities attached hereto)

15. If any of the grounds listed above were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N.R.S. 177.315 et seq allows for a supplemental petition and
authorities.

16. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes X No

If "yes," state what court: Eighth Judicial district Court
Clark County.

17. Give the name and address if known of each attorney who represented you in the following stages of the judgment under attack herein:

(a) At preliminary hearing: David Gibson

(b) At arraignment and plea: David Gibson

(c) At trial: At the entry of guilty plea the petitioner was
represented by Stephen J. Dahl and David Gibson

(e) On appeal: N/A

(f) If any post-conviction proceeding:

Lee Elizabeth Mc Mahon

1 18. Were you sentenced on more than one count of an indict-
 2 ment or information or on more than one indictment or information
 in the same court and at the same time?

3 Yes _____ No x

4 19. Do you have any further sentence to serve after you com-
 5 plete the sentence imposed by the judgment under attack?

6 Yes _____ No x

7 (a) If so, give name and location of court which imposed
 8 sentence to be served in the future: None

9
 10 (b) Give date and length of sentence to be served in the
 11 future: N/A

12
 13
 14 (c) Have you filed, or do you contemplate filing any petition
 15 attacking the judgment which imposed the sentence to be served
 16 in the future?

17 Yes _____ No _____ N/A

18 20. If you are not filing the petition within 1 year after
 19 the final judgment of your conviction or of the final decision
 20 in your appeal, if any, state here good cause why not, and why the
 21 petition should be heard now. (You must relate specific facts in
 22 response to this question. Your response may be included on paper
 23 which is 8 1/2 by 11 inches attached to the petition. Your
 24 response may not exceed five handwritten or typewritten pages
 25 in length.) The original petition was filed within one year.

1 WHEREFORE, Petitioner prays that the court grant relief to
 2 which he may be entitled in this proceeding.

3 DATED this 6 day of March, 1991.

4 Jimmie Davis
 5 Signature of petitioner
 6 Ely State Prison
 7 Post Office Box 1989
 8 Ely, Nevada 89301
 9 Address

8 STATE OF NEVADA)
 9) ss.
 10 County of White Pine)

11 VERIFICATION

12 Pursuant to NRS 15.010, under penalties of perjury, the under-
 13 signed declares that he is the petitioner, named in the foregoing
 14 petition and knows the contents thereof; that the pleading is true
 15 of his own knowledge, except as to those matters stated on infor-
 16 mation and belief, and that as to such matters he believes it
 17 to be true.

18 DATED this 6 day of March, 1991.

19 Jimmie Davis
 20 Signature of petitioner

21 Signature of petitioner's
 22 attorney (if any)

23 CERTIFICATE OF SERVICE BY MAIL

24 I, Jimmie Davis, hereby certify pursuant to
 25 N.R.C.P. 5(b), that on this 6 day of March, 1991,
 26 I mailed a true and correct copy of the foregoing PETITION FOR
 27 POST-CONVICTION RELIEF addressed to:

28 Rex Bell
 District Attorney
 200 South Third Street
 Las Vegas, Nevada 89155

Address

Jimmie Davis
 Signature of Petitioner

D I S T R I C T C O U R T
CLARK COUNTY, NEVADA

Jimmie Davis,

Petitioner,

vs.

Case No. C85078

Dept. No. IV

Docket No.

The State of Nevada,

Respondent.

COVER SHEET FOR

SUPPLEMENTAL PETITION FOR

POST-CONVICTION RELIEF (N.R.S. 177.315 et seq.)

Date of Hearing:

Time of Hearing:

EXHIBIT
A

27

D I S T R I C T C O U R T
CLARK COUNTY, NEVADA

Jimmie Davis,

Petitioner,

vs.

Case No. C85078

Dept. No. IV

Docket No.

The State of Nevada,

Respondent.

POINTS AND AUTHORITIES IN SUPPORT OF
SUPPLEMENTAL PETITION FOR
POST-CONVICTION RELIEF (N.R.S. 177.315 et seq.)

Date of Hearing:

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I

ARGUMENT

The record is bare of the elements of first degree murder, neither is there anything in the record showing that the Court explained the Elements of first degree murder to the petitioner before accepting his guilty plea. The petitioner argues that intent to cause death was an element of the crime

EXHIBIT
B-28

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1 of murder in the first degree. However, the state argued at the
2 guilty plea hearing indirectly that intent to cause death was
3 not an element of the offense because the petitioner's intent
4 was established when he pointed the victim's gun at her and
5 told her to leave without her gun. The state's argument was in
6 violation of the plea negotiations and could not be used to
7 establish felony-murder. Therefore, the Court had a duty to
8 explain to the defendant, on the record, the elements of first
9 degree murder. Besides, the Court would have still had the same
10 duty to explain the felony-murder rule to the defendant if its
11 application had been correct. See, HENDERSON v. MORGAN, 426
12 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). Also, the
13 defendant never made any factual allegations that would
14 constitute murder in the first degree. See HANLEY v. STATE, 624
15 P.2d 1387 (1981). The plea should be set aside and the
16 petitioner should be allowed to plead anew.

17 II

18 ARGUMENT

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21 The petitioner argues that he was denied due process of
22 law on the grounds that the robbery and its allegations were
23 dismissed before he entered his guilty plea, but at page 7 and
24 8 of the guilty plea transcript the prosecutor used the robbery
25 allegation to establish "Felony Murder". The petitioner argues
26 that this was in violation of article 1, section 8, of the

1 Nevada Constitution. His attorneys failed to object, but the
2 error is one that violates the petitioner's State and Federal
3 Constitutional rights.

4
5 III

6 ARGUMENT

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8 The petitioner argues that the Court did not have
9 jurisdiction to hear the robbery allegation or anything
10 pertaining thereto since those charges were dismissed and the
11 state promised that they would not be for consideration to the
12 plea for murder in the first degree. Even though the attorneys
13 for the petitioner failed to object, the fourteenth amendment
14 of the constitution of the United States does not allow a
15 juvenile confronted with charges as serious as first degree
16 murder to be left to rely on inadequate counsel for his defense
17 even in a guilty plea hearing.

18
19 IV

20 ARGUMENT

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22 In all guilty plea hearings the Court has the duty to
23 determine the degree of the crime that the accused is charged
24 with after it accepts a guilty plea. In the case at bar the
25 petitioner was interrupted by the prosecutor while trying to
26 convey to the court the necessary facts of the crime. See

1 guilty plea transcript page 7. Actually, the Court never did
2 hear enough from the petitioner on October 12th 1988 to
3 determine that the degree of murder was in the first degree.
4 See SHERIFF v. CLARK COUNTY v. LIGMAN, 697 P.2d 107 (1985);
5 RAMOS v. STATE, 58 Nev. 446, 83 P.2d 147, (1938). If the Court
6 had determined degree of the crime in this case it would have
7 found an abundance of evidence that showed that the defendant,
8 if but for his attorneys failure to defend him, could have not
9 been convicted of any of the degrees of murder. Involuntary
10 manslaughter may have been out of the adult Court's
11 jurisdiction? Consequently, the attorneys failed to save the
12 Court from mistake by requesting that the Court hear the
13 defendant's story in full then determine the degree of his
14 guilt. See for example: HARRIS v. STATE, 76 Tex.Cr.R. 126, 131,
15 172 S.W. 975, 977 (1915).

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17 v

18 ARGUMENT
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20 The record shows that the prosecutor told the Court,
21 after moving that the robbery and its information be dismissed,
22 that the robbery was in no way had anything to do with the
23 negotiations and that it would not be considered. See page 3 of
24 the guilty plea transcript. However, the prosecutor turned
25 right around and used the petitioner's out of Court statement
26 to "state for him" the facts of the crime. Twice he stated that
27
28

1 the petitioner told the victim to "get out". He told the Court
2 that the petitioner's intent arose from his intent to keep the
3 weapon. See guilty plea transcript page 8. It is clear that the
4 prosecutor is using the information from the already dismissed
5 count of robbery to establish murder in the first degree. The
6 prosecutor must not be allowed to use an out of Court statement
7 made by the petitioner at a time when he was under extreme
8 duress; besides, the statement was never considered by the
9 Court for its voluntariness. See, SANTOBELLO v. NEW YORK, 404
10 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The petitioner
11 was never asked did he commit the crime intentionally. He made
12 no factual allegations to the Court that would have constituted
13 elements of the offense for first degree murder. HANLEY SUPRA.
14 Therefore, the plea should be set aside.

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CONCLUSION

HERE, the petitioner has set forth good cause for setting aside his plea, and this Court should so find that the plea is constitutionally infirm.

WHEREFORE,

The petitioner prays that his plea of guilty be set aside and that he be allowed to plead anew.

For whatever other relief that this Court deems just and appropriate.

DATED this 6 day of March, 1991

Respectfully Submitted

Jimmie Davis #22362

Jimmie Davis,

Lee Elizabeth Mc Mahon,
Attorney for petitioner.

Law Offices of
Cherry & Bailus

501 SOUTH SIXTH STREET
LAS VEGAS, NEVADA 89101

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(702) 385-3788

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(702) 385-5125

MICHAEL A. CHERRY, ESQ.
MARK B. BAILUS, ESQ.
CATHERINE ANN WOOLF, ESQ.

DOLORES M. LAVERTY
GAIL A. GRISWOLD
LEGAL ASSISTANTS

July 26, 1991

Mr. Jimmie Davis
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301

Re: Jimmie Davis v. State of Nevada

Dear Mr. Davis:

Please be advised that on July 22, 1991 the undersigned was appointed to represent you regarding your Post-Conviction Relief. I have been in contact with Ms. Lee McMahon and have obtained portions of her file relating to the original Petition for Post-Conviction Relief filed in 1989, as well as your most recent Petition dated March 6, 1991. She also provided me with letters she received from Mr. Anthony C. Green regarding your case. I am also in receipt of a copy of Reporter's Transcript of Plea heard on October 12, 1988.

As I am only in receipt of these documents just today, I obviously have not had the time to digest their contents. I will begin preparation of the Supplemental Points and Authorities of your Post-Conviction Relief and will advise as to when this matter has been set for evidentiary hearing.

Should you have any questions regarding this matter, or should you wish to discuss this further with me, please feel free to contact my office by calling collect.

Sincerely,

Mark B. Bailus
MARK B. BAILUS, ESQ.

1/ps

MBB/ps

August 7, 1991

To: MARK B. BAILLUS SQ
501 SOUTH SIXTH STREET
LAS VEGAS NEVADA
89101

Dear Sir:

In my supplemental petition I argued that the court did not have jurisdiction to hear the robbery case for the purpose of establishing the degree of the homicide. In actuality I was a juvenile when the offense was committed, consequently, the adult court did not have jurisdiction over me on the robbery charge. I had a right, I believe, to be tried in juvenile court on the robbery charge before entering a plea in adult court. However, See In Re Famey, 583 P.2d 1210 (1978); Jessie v. Superior Court of San Mateo County, 576 P.2d 963, 145 Cal.Rptr. 1, 20 C.3d 893, vacated California v. Jessie West, 99 S.Ct. 304 (1978); Garrison v. Jennings, 529 P.2d 536 (1974); State v. Watson, 586 P.2d 1253, 120 Ariz. 441 Cert. Den. 99 S.Ct. 1254 (1978). I believe that the Juvenile Court would maintain jurisdiction over the robbery charge until an appeal was taken from its decision and judgment; therefore, since I was a juvenile I had a right to be tried in Juvenile Court on the robbery charge if the state was going to use it as an underlying felony to establish felony-murder?

35

Please let me know if the above issue have merit. I never intended to shoot or kill the victim. I tried to convey that to the court at my entry of guilty plea hearing but I was interrupted by the prosecutor. I was joking with the victim and when I tried to lower the gun to and uncock it the hammer slipped and she got shot. I never told the court that I intended to kill the victim. If I find any more case law in support of my issues I will send them to you.

Sincerely,

Jimmie Davis
Jimmie Davis, Inmate # 27362

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301

FILED

DISTRICT COURT JAN 9 3 28 PM '92
CLARK COUNTY, NEVADA

JIMMIE DAVIS,

Petitioner,

vs.

THE STATE OF NEVADA

Respondent,

John A. Johnson
CLERK

Case No: C-85078

Dept No: 1V

Docket No: "C"

=====

Date of Hearing _____

Time of Hearing _____

AFFIDAVIT IN SUPPORT OF
PETITION FOR POST-CONVICTION RELIEF

STATE OF NEVADA)

) ss:

COUNTY OF WHITE PINE)

I, JIMMIE DAVIS, do hereby swear under penalty of perjury
that the assertions of this affidavit are true.

1. That I Jimmie Davis am the Petitioner in the above-
entitled action and make this affidavit in support of my
Petition for Post-Conviction Relief.

2. That Petitioner is competent to testify and therefor
would be able to testify if called upon to do so and have
personal knowledge to the truth of the facts herein set out,
except to those matters stated on information and belief,
and as to such matters he believes the same to be true.

3. That Petitioner is entitled to relief sought.

4. That Petitioner makes this affidavit in good faith.

5. That Petitioner was denied Due Process of Law.

37

1 6. That Petitioner was denied the effective assistances
2 of counsel during plea negotiation's and plea hearing. Counsel
3 never explained to Petitioner the elements of the crime charged
4 when case law clearly states that in order for a guilty plea
5 to be accepted the defendant must know the elements of the
6 crime to which he plea's.

7 7. That Petitioner was denied effective assistances of
8 counsel when counsel failed to explain what "MALICE AFORETHOUGHT"
9 meant, and that by pleading guilty Petitioner was admitting
10 that he intentionally killed the victim despite Petitioners
11 unwavering claim that the shooting was accidental.

12 8. That appellate counsel failed to persue or investigate
13 after being told by an eye witness that they would testify
14 to the fact that the shooting was indeed an accidental shooting.
15 Yet counsel still had a sixteen (16) year old plea guilty to
16 First Degree Murder and agree to Life in prison without the
17 possibilty of parole, knowing the Petitioner was illiterate
18 to the criminal justice system. Whitmess being Arthur Cullins.

19 9. That Petitioners plea of guilt was not knowing and
20 intelligently or understandingly entered when the Courts failed
21 to canvass the Petitioner properly in open court, assuring
22 that he understood each and every element of the crime
23 before a plea of guilty could be accepted by the Court.

24 10. That Petitioner was seriously prejudiced as a result
25 of counsel's errors, omissions and counsel's failure to
26 investigate or interview witnesses and research applicable
27 law which would negate a First Degree Murder charge based upon
28 the factual circunstances surrounding the case at bar, thus

1 denying Petitioner his Sixth Amendment Right to reasonable
2 effective assistance of counsel.

3 11. That the records of the Plea Hearing are bare of the
4 elements of First Degree Murder therefor the Courts should
5 not have accepted the Petitioners guilty plea whereas no factual
6 statement to the Courts were made which would constitute an
7 admission to the elements of the offense charged.

8 12. That in prosecution of murder where defendant pleads
9 guilty, statue requires that Trial Court first determine
10 degree of guilt and then fix punishment upon theory that no
11 issue is left to guilt of crime of murder, Petitioner clearly
12 demonstrates that the Due Process in this claim was not carried
13 out therefore denying him of this right.

14 13. That Petitioner was denied Due Process of Law by use
15 of robbery allegation to establish felony murder. At the plea
16 hearing, the prosecutor dismissed the robbery charges and told
17 the Courts that it was not considered, than used robbery to
18 establish murder in the first degree. The Court did not have
19 jurisdiction to accept guilty plea based on robbery allegations.

20 14. That the Court dismissed the robbery information
21 and agreed that it was jurisdictional error, futhermore the
22 information used to establish the degree of the crime violated
23 the Due Process Clause.

24 15. That Petitioner was denied Due Process of Law when
25 the police failed to notify his parents or attorney before the
26 Petitioners interrogation, arrest or indictment, whereas a minor
27 is entitled to the presence of his parents or attorney before
28 he is charged with a crime as an adult.